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Supreme Court of the United States

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October Term, 1966.

JOHN J. AIELLO,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT, APPELLATE DIVISION AND THE SUPREME COURT OF THE STATE OF NEW JERSEY.

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INDEX

	PAGE
Citations to Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement of Facts	3
How Federal Questions Are Presented	6
Reasons for Granting the Writ	7
Conclusion	12
Appendix A	13

TABLE OF CITATIONS

CASES:

Boyd v. U. S., 116 U. S. 616 (1885)	9
Delli Paoli v. U. S., 352 U. S. 232, 288-289 (1957)	12
Go-Bart Importing Co. v. U. S., 282 U. S. 334 (1931)	8
Gouled v. U. S., 255 U. S. 298 (1920)	9
State v. Bisaccia, 45 N. J. 504, 518-519 (1965)	8, 9
U. S. v. Barkouskas, 38 F. 2d 837 (D. C. 1930)	7
U. S. v. Chin On, 297 F. 531 (D. C. Mass. 1924)	7

INDEX

PAGE

U. S. v. Diange, 32 F. Supp. 994 (D. C. 1940) 7

U. S. v. Hinton, 219 F. 2d 324 (7th Cir. 1955) 7

U. S. v. Lefkowitz, 285 U. S. 452 (1931) 9

Weeks v. U. S., 232 U. S. 383 (1913) 9

CONSTITUTIONS:

Fourth Amendment of the United States Constitution 7

Fifth Amendment of the United States Constitution 7

Sixth Amendment of the United States Constitution 6, 7

Fourteenth Amendment of the United States Constitution 6

Article I, Paragraph 10 of the New Jersey Constitution 6

STATUTE:

N. J. S. 2A:121-3(c) 1, 4

TABLE OF CONTENTS OF APPENDIX

Appendix B 1a

Opinion of Superior Court of New Jersey 1a

Order Denying Petition 10a

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT, APPELLATE DIVISION AND THE SUPREME COURT OF NEW JERSEY.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, John J. Aiello, respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of New Jersey which denied petitioner's petition for certification to the Appellate Division of the Superior Court of New Jersey, which latter court affirmed the judgment of conviction of your petitioner in the Essex County Court, entered on December 9th, 1965, charging petitioner with permitting the business of lottery to be carried on in his premises in violation of N. J. S. 2A:121-3(c).

CITATIONS TO OPINION BELOW.

The opinion of the Superior Court, Appellate Division, delivered by Kilkenny, J. A. D. printed in Appendix B (D1a) hereof, is reported in 91 N. J. Super. 457 (1966). The order of the Supreme Court of New Jersey denying the Petition for Certification is not reported to this date, a copy of which order is appended hereto as Appendix 10a.

JURISDICTION.

The order of the Supreme Court of New Jersey denying petitioner's Petition for Certification to the Appellate Division is dated October 4th, 1966 and was entered on October 4th, 1966. A copy thereof is appended hereto as Appendix B (D10a). The jurisdiction of this Court is invoked under Title 28 U. S. C. Section 1257 (3) since the petitioner's rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States are drawn in question.

QUESTIONS PRESENTED.

1. Whether a search warrant which authorizes the search of an entire multiple dwelling without limiting the area violates the Fourth Amendment of the United States Constitution?

2. Whether the seizure of merely evidentiary items not listed in the search warrant rendered the search unreasonable in violation of the Fourth and Fifth Amendments of the United States Constitution?

3. Whether the Superior Court of New Jersey, Appellate Division, may effectively deprive the petitioner of a jury trial of all issues involved provided within the Sixth Amendment of the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution by allowing the State to proceed under alternative theories for conviction after the trial and verdict?

4. Whether the joint trial of two indictments and two defendants deprived the petitioner of a fair trial and due process of law within the purview of the Fourteenth Amendment of the Constitution of the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Statutory and constitutional provisions involved are New Jersey Statutes Annotated 2A:121-3(c) and the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and New Jersey Constitution, Article I, Paragraph 10, all of which are printed in Appendix A, *infra*.

STATEMENT OF FACTS.

Trooper Scalzone applied to the Court for the issuance of a search warrant to search the premises and persons found thereon at 187 Fourth Street, Newark, New Jersey. Based upon his affidavit, a search warrant was issued authorizing a search of the whole premises. Members of the Prosecutor's office, armed with this search warrant, broke through the door of the premises and made a search of all the separate apartments therein, including the attic and basement, in an endeavor to find evidentiary material pertaining to lottery.

The building to be searched was a two-family dwelling, which was unrefuted and stipulated to by the Prosecutor. The building searched contained two separate apartments. The search warrant did not particularly describe the apart-

ment to be searched but authorized a blanket search of the whole premises.

The officers searched the whole building, including the first floor apartment occupied by John J. Aiello and his family. In the apartment occupied by Aiello and his family the officers found nothing at all relating to the offense of lottery, notwithstanding that the officers seized from his apartment, one address book, one bill fold, $500.00 in cash, one check payable to John Aiello that was old in date, another check endorsed to Aiello and one black three-quarter car coat. None of the items seized were introduced into evidence at the trial. It is also noted that none of the articles seized from petitioner's apartment were mentioned or included in the search warrant as items to be seized. A pretrial motion to suppress the evidence seized by the police under the warrant was denied by the trial court.

The petitioner was indicted along with one Vincent Giuliano under N. J. S. 2A:121-3(c) which provides:

> "Any person who . . .
>
> c. Being the owner of a building or place where any business of lottery or lottery policy, so called, is carried on knowingly, by himself or his agent, permits such premises to be so used—Is guilty of a misdemeanor."

The indictment charged that:

> ". . . John J. Aiello, being the owner of premises known as #187 Fourth Street, in the City of Newark, aforesaid *and* Vincent Giuliano, *his agent,* did then and there knowingly and unlawfully permit the business of lottery or lottery policy so-called to be carried on in said premises . . ." (Emphasis added.)

Vincent Giuliano was also indicted on a separate indictment for possession of lottery slips. After the jury was

sworn, the State moved to consolidate both indictments for a joint trial, which was objected to by the petitioner.

The evidence introduced by the State showed that John J. Aiello and Geraldine Aiello owned the premises; that the premises were a two family dwelling and that the first floor apartment was occupied by Petitioner and his family without direct access to the apartment where the lottery paraphernalia was found. A search of the apartment occupied by petitioner disclosed nothing relating to the offense charged. Giuliano was observed entering the premises approximately eighteen to twenty times carrying a brown paper bag and never once was petitioner ever observed in his presence. The State proceeded solely according to the language of the indictment and contended that proof of agency was necessary and that it did prove the element of agency.

At the end of the State's case petitioner made a motion for judgment of acquittal upon the grounds that the State's evidence failed to prove agency as charged in the indictment and also that there was no proof of knowledge by petitioner. The motion was denied. Both Giuliano and petitioner were found guilty under the joint indictment.

An appeal was taken to the Superior Court of New Jersey, Appellate Division. The Appellate Division held in its opinion that proof of agency was not necessary notwithstanding the language of the indictment. This was the first time that this theory was presented to petitioner, as a matter of record, the State even during the appeal contended proof of agency was necessary and argued that it did prove agency between Aiello and Giuliano. After arguments before the Appellate Court, the Court requested additional briefs indicating how the petitioner was prejudiced by allowing the State alternatives at this posture of the case. Briefs were submitted but the Appellate Division in its opinion does not rule upon this question and leaves it

unanswered. It is also apparent that the Appellate Division agrees with petitioner that agency was not proven by the State. This is evident from its opinion and from its comments made during oral arguments.

The conviction of petitioner was affirmed but Giuliano's conviction was reversed and set aside.

HOW FEDERAL QUESTIONS ARE PRESENTED.

Prior to the trial, petitioner moved for the suppression of all documentary evidence taken under a search warrant issued by the Court as being in violation of petitioner's rights under the Fourth Amendment to the United States Constitution. The motion to suppress was denied. At the trial the petitioner renewed his motion and it was again denied by the trial court.

After the jury was selected and sworn in the State made a motion to try both indictments and defendants in a joint trial, to which petitioner objected. The motion by the State was granted by the trial court. On appeal to the Superior Court, Appellate Division, and to the New Jersey Supreme Court petitioner again urged these contentions.

The Appellate Division in its decision held that one of the necessary elements of the offense charged, namely, agency, was not necessary for the State to prove, notwithstanding the fact that the indictment and statute made it necessary, and the State proceeded under this theory only. The petitioner submitted further briefs to the Appellate Division contending that he was prejudiced by this action and was deprived of a fair trial before a jury in violation of the Sixth and Fourteenth Amendments of the United States Constitution and also under Article I, Paragraph 10 of the New Jersey Constitution. By Petition for Certifica-

tion to the Supreme Court of New Jersey petitioner again urged all of these contentions.

The Superior Court of New Jersey, Appellate Division, passed upon all of these questions in its opinion (Appendix B (D1a), *infra*) except the question involving a trial by jury guaranteed by the New Jersey and United States Constitutions. The New Jersey Supreme Court denied the Petition for Certification (Appendix B (D10a), *infra*). Federal questions are, therefore, properly presented by virtue of petitioner's claim of contravention of his rights under the Fourth, Fifth and Sixth Amendments of the United States Constitution as made applicable to the states by the Fourteenth Amendment to the United States Constitution, specifically as set forth hereinabove.

REASONS FOR GRANTING THE WRIT.

1. The Fourth Amendment to the United States Constitution requires that:

> ". . . no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

The Federal Courts have held for the purpose of satisfying the requirements of the Fourth Amendment, that when there is a search of two or more apartments in the same building, it is no different than searching two or more completely separate houses and probable cause must be shown for searching each apartment. *U. S. v. Hinton*, 219 F. 2d 324 (7th Cir. 1955); *U. S. v. Barkouskas*, 38 F. 2d 837 (D. C. 1930); *U. S. v. Diange*, 32 F. Supp. 994 (D. C. 1940); *U. S. v. Chin On*, 297 F. 531 (D. C. Mass. 1924).

The search warrant in the instant case does not satisfy

the requirements of the Fourth Amendment as it authorizes a search of the entire dwelling and persons found therein without particularly describing the apartment to be searched. The premises searched was a two-family dwelling, which fact was unrefuted and stipulated to by the State.

It is crystal clear that the Superior Court of New Jersey, Appellate Division "closed its eyes" to all the Federal cases and law dealing with this question and is now in direct conflict with the constitutional law of the land. It is important to the administration of criminal justice in both the State and Federal Courts that this court resolve the conflict noted above and determine whether a search warrant authorizing the search of an entire multiple dwelling when cause to search the entire building is lacking is valid or void. This Court has already held in *Go-Bart Importing Co. v. U. S.*, 282 U. S. 334 (1931), that general or blanket searches are invalid as exploratory and that the very purpose of issuing a search warrant is to protect against all general searches.

2. The Superior Court, Appellate Division, of New Jersey, ruled that a search and seizure of evidence of guilt is permissible in this State pursuant to a Supreme Court decision of New Jersey, *State v. Bisaccia*, 45 N. J. 504, 518-519 (1965). By so holding the court completely turned its back on a long line of cases in this Court holding that search warrants may not be used for the purpose of making searches to secure mere evidence to be used against a defendant in a criminal case and is limited to fruits, instrumentalities and contraband.

In the instant case the search warrant provides for the seizure of "slips, moneys, papers, records, memoranda, sheets, and paraphernalia used in connection with the crime of lottery." Taken from the petitioner were the following

items: one telephone address book, one wallet, check payable to the order of John J. Aiello, one car coat, check payable to the order of Vincent Julian and five hundred dollars in cash. None of these items fall into any of the three categories above mentioned and none are mentioned in the search warrant, except money, and money can be seized only if it is shown that it was used in connection with the offense charged.

The New Jersey Supreme Court has held in *State v. Bisaccia, supra,* that:

> "the Fourth Amendment contemplates that things may be seized for their inculpatory value alone and that a search to that end is valid so long as it is not otherwise unreasonable and the Fourth Amendment's formal requirements, if applicable, are met" p. 519.

The Appellate Division of New Jersey based its decision in this case upon the above opinion which is contrary to the holdings of this Court, originating with *Boyd v. U. S.,* 116 U. S. 616 (1885) and followed by *Gouled v. U. S.,* 255 U. S. 298 (1920); *Weeks v. U. S.,* 232 U. S. 383 (1913); *U. S. v. Lefkowitz,* 285 U. S. 452 (1931); and many other cases.

3. The constitutional provisions of the State of New Jersey and the United States secure the petitioner the right to trial by an impartial jury and to be informed of the nature and cause of the accusations. The Appellate Court of New Jersey has affirmed the conviction in this matter by adding words to the indictment which did not appear and were deliberately eliminated. The words added by the Court are "by himself." The addition of these words made the offense entirely different than the one charged in the indictment. The Court permitted counsel to argue orally on this question and to submit further briefs on the matter, but in its decision it made no mention of the prejudicial

effect this had upon the petitioner nor the violation of his constitutional right to be adequately informed of the nature and cause of the offense charged and his right to trial by jury of all questions.

It is to be noted that the State proceeded throughout the trial upon the theory that Giuliano was the agent of the petitioner, Aiello, and attempted to prove agency. The defense was based upon the language of the indictment as handed down by the Grand Jury.

During oral arguments before the Appellate Division, the defendant was for the first time confronted with the theory that proof of agency was not necessary and petitioner could be found guilty without same if the State proved that Aiello "by himself" permitted the premises to be used. The case was already tried before a jury at this point and the defendant could not at this time introduce evidence to refute this theory, which was not presented during trial, nor was he prepared to defend a crime not charged.

The Court by adding words to an indictment and allowing the State alternative theories after trial is effectively depriving the petitioner of his constitutional right to trial by jury of all issues and to be informed of the nature and cause of the accusation.

4. The joint trial of both indictments and defendants was prejudicial to the petitioner in this matter.

Petitioner and Giuliano were indicted as co-defendants on the same indictment charging that Giuliano was the agent of Petitioner and that he allowed his premises to be used for the purpose of lottery. Giuliano was indicted on a separate indictment which charged him with the offense of possession of lottery slips. After the jury was selected and sworn in the State moved to try both indictments together, which was objected to by the defense. The trial court ordered both indictments be tried together.

The indictments charged separate and distinct offenses, each of which was complete in itself, each of which was independent of each other and not provable by the same evidence and each of which occurred on different days. Throughout the trial both the Prosecutor and the trial judge referred to the evidence admitted against Giuliano for the offense of possession in connection with the charge against the petitioner. The Prosecutor in his summation informed the jury to draw inferences from the evidence admitted against Giuliano in determining the guilt of the petitioner. The Court also in deciding the motion for acquittal took into consideration evidence and facts against Giuliano and drew inferences from these facts in its order denying the motion. This is indicated in the record where the State stated that the jury should examine S-1 in evidence (admitted only as to Giuliano for the offense of possession) with the other bags taken from the premises and look at all the bags together and draw conclusions from this.

The only basis for permitting the two indictments to be tried together was due to the fact that Giuliano and petitioner were named as co-defendants in one of the indictments. There can be no doubt that the two indictments would not have been consolidated except for this fact. The joint trial was prejudicial to the petitioner especially when the Appellate Division of New Jersey decided in its opinion that it was error to name Giuliano in the indictment with the petitioner and he should not have been so named. This conviction as to Giuliano was reversed but affirmed as to petitioner, notwithstanding this fact.

It is quite evident that the consolidation substantially prejudiced the petitioner's right to a fair trial, and that the State had succeeded in its strategy to try both defendants together in spite of the fact that it could not do so unless it has erroneously indicted one of the defendants. This error was first mentioned by the Appellate Court although

the whole procedure was objected to by defense from its inception.

In *Delli Paoli v. U. S.*, 352 U. S. 232, 288-289 (1957), Justice Frankfurter speaking for a minority of four stated:

> "The government should not have the windfall of having the jury influenced against the defendants which, as a matter of law, they should not consider but which they cannot put out of their minds."

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ACCARDI AND KOCH,
Attorneys for Petitioner,
JOSEPH S. ACCARDI,
A Member of the Firm.

Date:

APPENDIX A.

APPENDIX A—CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

NEW JERSEY CONSTITUTION.

Article I, Paragraph 10:

In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense.

UNITED STATES CONSTITUTION.

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land

or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW JERSEY STATUTE.

2A:121-3. Permitting lotteries on premises; possessing lottery paraphernalia; working for lottery business

Any person who:

(c) Being the owner of a building or place where any business of lottery or lottery policy, so-called, is carried on knowingly, by himself or his agent, permits such premises to be so used—Is guilty of a misdemeanor.

APPENDIX B.

OPINION OF SUPERIOR COURT OF NEW JERSEY.

Argued June 6, 1966—Decided June 16, 1966.

Before: JUDGES CONFORD, KILKENNY and LEONARD.

On appeal from the Essex County Court, Law Division.

MR. JOSEPH S. ACCARDI argued the cause for appellant John J. Aiello.

MR. NORMAN FISCHBEIN argued the cause for appellant Vincent Giuliano (Mr. Joseph S. Accardi, of counsel).

MR. BARRY H. EVENCHICK, Assistant Prosecutor, argued the cause for respondent (Mr. Brendan T. Byrne, County Prosecutor of Essex County, attorney).

The opinion of the court was delivered by

KILKENNY, J. A. D.

A jury in the Essex County Court found defendant John J. Aiello guilty of knowingly permitting a building or prem-

ises owned by him to be used for the carrying on of the business of lottery or lottery policy, so called, in violation of N. J. S. 2A:121-3(c). He was sentenced to State Prison for a term of not less than two nor more than three years. He appeals from the judgment of conviction.

Defendant Vincent Giuliano, who was also indicted with Aiello for violating N. J. S. 2A:121-3(c) and charged in a separate indictment with the illegal possession of lottery slips, N. J. S. 2A:121-3(b), was found guilty of both charges by the jury in the consolidated trial of both defendants. Giuliano was similarly sentenced to a prison term of two to three years for violation of N. J. S. 2A:121-3(c) and received a suspended sentence for violation of the illegal possession charge. N. J. S. 2A:121-3(b). He also appeals.

Both appeals were consolidated for oral argument. However, resolution of the Giuliano appeal can be readily resolved without recourse to other questions raised by Aiello. Hence, we dispose of Giuliano's case first.

I. AS TO GIULIANO.

A.

At oral argument Giuliano's attorney announced that this defendant abandoned his appeal from the judgment of conviction based upon the illegal possession of lottery slips, N. J. S. 2A:121-3(b). Indeed, there was ample evidence before the jury to support its finding of guilt on that charge. Accordingly, that judgment of conviction is affirmed.

B.

While the point was not raised below or in the briefs on appeal, we questioned the validity of Giuliano's conviction for violating N. J. S. 2A:121-3(c), in the light of a trial record which showed that Aiello, and not Giuliano, was admittedly the owner of the premises, 187 Fourth Street, Newark, wherein the business of lottery was allegedly carried on. We gave the prosecutor and Giuliano's attorney additional time to brief the point and this has been done.

N. J. S. 2A:121-3(c) provides:

> "Any person who
>
> * * * * * * * *
>
> c. *Being the owner of a building or place* where any business of lottery or lottery policy, so-called, is carried on knowingly, by himself or his agent, permits such premises to be so used—Is guilty of a misdemeanor." (Emphasis added.)

One of the essentials of this crime is "ownership" of the building. Giuliano was not an owner of the building where the lottery was allegedly carried on. He could not, therefore, be legally convicted of a violation of N. J. S. 2A:121-3(c).

The State cites *State v. Low,* 18 N. J. 179 (1955), in which a statute penalizing misappropriation of funds from an order of realty was held broad enough to include misappropriation from a contract vendee. The case is not in point as it does not involve a statute identifying the criminal as the owner. Nor are we concerned with cases cited by the State wherein the statute involved defines "owner" in terms broad enough to include an agent.

It is also argued by the State that this conviction can be sustained on the theory that Giuliano was an aider and abettor of Aiello. We think not. The State cites no case

wherein a non-owner was held liable as an abettor of the owner where the statute made ownership a condition of criminal liability. One charged with a crime is entitled to require the State to make strict proof of each statutory element of the crime charged.

Accordingly, Giuliano's conviction for violating N. J. S. 2A:121-3(c) is reversed and set aside.

II. AS TO AIELLO.

Aiello's first contention is that his motion for judgment of acquittal at the end of the State's case should have been granted. He relies heavily upon the argument that the indictment charged that Giuliano was "his agent" and the proofs do not support a finding of any such agency.

The indictment charged that:

> "* * * John J. Aiello, being the owner of premises known as #187 Fourth Street, in the City of Newark, aforesaid *and* Vincent Guiliano, *his agent,* did then and there knowingly and unlawfully permit the business of lottery or lottery policy so-called to be carried on in said premises * * *." (Emphasis added.)

We do not regard that indictment, so conjunctively worded, as requiring an acquittal of Aiello, if the State failed to prove that Giuliano was his agent. N. J. S. 2A:121-3(c) makes an owner of premises criminally responsible, if the business of lottery is carried on in the premises to the knowledge of the owner, "by himself *or* his agent." (Emphasis added.) A jury could reasonably find from the evidence herein that defendant Aiello *knew* "by himself," and without regard to Giuliano's also knowing the fact, that the premises were being used to carry on the business of lottery and that Aiello permitted the premises to be so

used. Hence, proof that Giuliano was Aiello's agent was not essential to conviction.

Aiello's next point, which is really a corollary of his first contention, *supra,* is that the trial court erred when it charged the jury that Aiello could be found guilty, if he himself permitted the premises to be used for the business of lottery. The trial judge told the jury that the statute applies to the case "where the owner used the building himself for lottery purposes since one who operates a lottery in his own building permits such premises to be so used within the meaning of the statute." This instruction represents a correct statement of the law. The language is taken almost verbatim from *State v. Smith,* 21 N. J. 326, 331 (1956).

The gist of defendant's argument under this point is that the indictment charged Aiello with responsibility for the act of Giuliano, as his agent, and this precluded his being found guilty if the act or knowledge were his own. Reliance is placed upon *State v. Smith, supra.* But *Smith* is distinguishable. There Smith was charged under two separate indictments with violating N. J. S. 2A:121-3(c). The first alleged that Smith *himself* knowingly permitted the premises to be used for lottery purposes; the second charged that Smith *by his agents* knowingly permitted the premises to be so used. At the close of the proofs, the trial court dismissed the indictment which charged Smith with responsibility solely for the acts of his agents on the ground that there was no proof of agency. But the conviction of Smith for what he himself knew and had done was affirmed on appeal. The indictment in the instant case does not limit Aiello's responsibility to what was done "by his agent" but charges him conjunctively with violating the law himself. The conjunctive "and" in the *joint* indictment in this case, as opposed to the preposition "by" in the separate indictment against the owner alone in *Smith,* distinguishes that case

from this. Thus, the jury might have found no agency relationship and still properly have convicted Aiello. The instruction correctly made that possibility clear and was, therefore, not erroneous.

Aiello's next claim of error is that his joint trial with Giuliano, to which he had objected, prejudicially affected his right to a fair trial. The gist of his argument is that the evidence of Giuliano's unlawful possession of lottery slips, admissible under the separate indictment against Giuliano alone, was totally unrelated to the charge against him. He reasons that it was impossible for the jury to isolate the evidence of the one offense from the other and that constant reference by the court and the prosecutor to the incriminating evidence found in Giuliano's possession away from the premises resulted in the evidence in the one case being carried over to his prejudice to the other case being tried at the same time.

We recognize that in a joint trial, such as this, as in almost every joint trial, there is a potential of prejudice. The evidence against one defendant alone may possibly have an adverse impact against the other joint defendant. The same is true when multiple charges against one defendant are tried at the same time. *State v. Manney,* 26 N. J. 362 (1958). But that case points out that "if separate offenses were required to be tried separately in all circumstances, the multiplicity of trials would disserve the State and defendants alike." *Id.* at p. 366. It also laid down the rule:

> "* * * a mere possibility of such harm is not enough to bar joinder or consolidation; if it were, nothing would remain of the rule. The question is whether a jury is likely to be unable to comply with the trial court's instructions. Of necessity, a wide range of discretion must repose in the trial judge * * *" (*Id.* at p. 368).

See also *State v. Coleman,* 46 N. J. 16 (1965), for the broad rule that, in the interests of economy and efficiency, similar

or related offenses may be joined for single trial so long as defendant's right to fair trial remains unprejudiced. Also, *cf.* R. R. 3:4-7, 3:4-8 and 3:5-6.

There was good reason to try both defendants and both indictments herein at the same time. Each case involved the same witnesses. The offenses involved an alleged relationship between the co-defendants. There was a concomitance of circumstances whereby the arrest of Giuliano with his brown paper bag containing lottery slips was immediately followed by a search of the Aiello building, pursuant to a search warrant, wherein other similar bags of lottery slips were discovered. Thus, the brown paper bag in Giuliano's possession was relatively, insignificant compared with the great quantity of such bags found in the building along with the other physical evidences of the conduct of a lottery business therein.

Moreover, the trial court clearly instructed the jury as follows:

> "Now, as you know, you are trying two separate and distinct cases. You are trying two defendants each of whom are charged with a separate crime with a separate and distinct indictment. * * * You have two separate and distinct cases before you. Now, the fact that you are trying two separate and distinct indictments, you must not let that circumstance mislead you in your considerations of the guilt or innocence of these defendants. The case of each defendant stands on its own bottom, which is to say, that each one of these defendants deserves your separate consideration in connection with your determination of his guilt or innocence of the crime charged against each one."

This cautionary instruction reduced to *de minimis* the possibility of prejudice to defendant Aiello resulting from a joint trial. We find no mistaken exercise of discretion by

the trial judge in permitting the joint trial under the facts and circumstances herein.

Aiello maintains that the search warrant was defective because it and the affidavit upon which it was based did not describe the place to be searched with sufficient particularity to satisfy the requirements of the Fourth Amendment. A pretrial motion to suppress the evidence seized by the police during the search under the warrant had been denied by the trial court.

The affidavit supporting the issuance of the search warrant referred to the premises as 187 No. 4th Street, Newark and described it as "a one-family dwelling," listed in the names of John and Geraldine Aiello. The search warrant referred in its preamble to the premises as a "private dwelling" and its authorizing part allowed any law enforcement officer to enter 187 No. 4th Street, Newark and search for the lottery paraphernalia. The police authorities had the premises under surveillance for over two months and had seen Giuliano enter on 23 occasions with his brown paper bag. There was a single front entrance and the police believed the premises to be a one-family residence. There was only one phone subscriber and no evidence that the premises were other than a private dwelling occupied by Aiello and his wife.

When the search was made, the police found no incriminating evidence on the first floor where the Aiellos resided. On the second floor there were some chairs, a pool table, a bathroom, a kitchen, but no other furniture. There was no evidence of any occupancy by any other family. Proceeding to the third floor, the police observed a table, two adding machines, a dresser with rolls of tape and small pads, and a closet type room with a number of brown paper bags in it. The bags contained thousands of dollars of policy slips. Here, too, there was no evidence of occupancy by

any other family. In fact, therefore, the building was resided in only by the Aiellos.

This case is different from *State v. Ratushny*, 82 N. J. Super. 499 (App. Div. 1964), where the police knew that the premises were occupied by more than one family and had no reason to believe that incriminating or illegal objects might be found in more than one apartment. In such a situation a designation of the particular apartment to be searched is ordinarily required. Where, however, as here, such information is not known and the outward appearance of the house, in conjunction with what the police knew about Giuliano's access to the house, furnished no basis for a reasonable belief that incriminating or illegal objects would be found in only a specific identifiable portion of the interior of the building, particularization of such a portion in the warrant is not necessary. As stated in *State v. Romeo*, 43 N. J. 188, 206, "The fundamental requirement of the Fourth Amendment is reasonableness." See, too, *State v. Daniels*, 46 N. J. 428 (1966), where it is held that accuracy in the description in every detail is not required. Certainly, the police, having watched this building for months and observing no occupancy by any family other than the Aiellos and Giuliano's periodic visits, acted reasonably in describing the premises as a private one-family dwelling.

Accordingly, we find no valid basis for a reversal on this ground.

We find no substantial merit in Aiello's contention that the articles seized by the police were not within the goods described in the warrant and were "merely evidentiary materials." The warrant authorized a search for: "Slips, moneys, papers, records, memoranda, sheets and paraphernalia used in connection with the crime of lottery." The items seized came within that description. As to a search for and seizure of evidence of guilt, the rule in our State is that

such a search and seizure are permissible. R. R. 3:2A-2(c); *State v. Bisaccia*, 45 N. J. 504, 518-519 (1965).

Defendant's final claim of error is that the trial court allowed evidence not admitted during the trial to enter the jury room during the jury's deliberation. The reference is to a car coat belonging to Aiello which was taken into the jury room along with certain cartons containing other evidence.

The car coat was in one of the cartons. The cartons and the contents were received in evidence. Defendant made no specific objection to the car coat being included. The car coat was thus in evidence. Accordingly, there is no basis for defendant's present contention that evidence entered the jury room which had not been admitted during the trial.

The judgment of conviction as to Aiello is affirmed.

As noted above the judgment of conviction as to Giuliano is affirmed as to the indictment charging unlawful possession of lottery slips, N. J. S. 2A:121-3(b), but Giuliano's conviction of a violation of N. J. S. 2A:121-3(c) is reversed.

ORDER DENYING PETITION.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 4th day of October, 1966.

JOHN H. GILDEA,
Clerk of the Supreme Court.